# IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

## SPECIAL CIVIL APPLICATION No. 10930 of 1995

**For Approval and Signature:**

**HONOURABLE MS.JUSTICE H.N.DEVANI**

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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**PUNJABHAI JETHABHAI PATEL - Petitioner(s)**

**Versus**

**STATE OF GUJARAT & 4 - Respondent(s)**

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**Appearance :**
MR JITENDRA M PATEL for Petitioner
NOTICE SERVED for Respondent(s) : 1,
MR KH BHAYA for Respondent(s) : 2 - 5.
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**CORAM : HONOURABLE MS.JUSTICE H.N.DEVANI**

**Date : 07/09/2005**

**ORAL JUDGMENT**

1.By this petition under Article 226 and 227 of the Constitution of India, the petitioner challenges the order dated 30th June 1995, passed by the State Government (Annexure

"F"); the order dated June 1993, passed by the Collector, Sabarkantha (Annexure "E"); the order dated 29th May 1989, passed by the Deputy Collector, LAND-8 Scheme, Sabarkantha, Himmatnagar (Annexure "D"); as well as the order dated 13th January 1989 passed by the Collector, Sabarkantha (Annexure "C"). The petitioner prays that the order dated 21st May 1984, passed by the Deputy Collector, Land Scheme – 11, Visnagar, (Annexure "B") be confirmed.

2. The short facts of the case are that the petitioner Patel Punjabhai Jethabhai who was the owner of land admeasuring 2 Acres 11 gunthas of Survey No.101 of village Bundheli, Taluka Bhiloda, transferred the said lands to one Manglaji Dhanaji Bhagora in exchange for lands admeasuring 2 acres of Survey No.94/2 of the same village owned by

the said Mangalaji by way of a registered deed. The Deputy Collector, Land Scheme 11, Visnagar was of the view that the said transfer was in breach of the provisions of section 73A of the Bombay Land Revenue Code, 1879 (the Code) in that the lands which stood in the name of Manglaji who was a tribal, were of restricted tenure under section 73A of the Code, he, accordingly, registered a case and issued notices to the parties.

3. The Deputy Collector, after hearing the parties and recording the evidence led by them, found that the aforesaid transfer did not in any manner prejudice the interest of the tribal occupant and that to the contrary the same was for his benefit. He accordingly, by an order dated 21st May 1984, upheld the transaction of exchange and

dropped the proceedings under section 73AA of the Code.

4.The Collector, Sabarkantha, found that the aforesaid decision of the Deputy Collector was against the tribal occupant, hence, he in exercise of suo motu revisional powers under section 211 of the Code issued notices to the concerned parties. The Collector found that by a notification dated 4.4.1961 the provisions of section 73A of the Code had been made applicable to Bhiloda Taluka; that, the transfer in question took place by a registered document dated 30.3.1976; that the said transfer was effected without obtaining the prior permission under section 73A, hence, action was required to be taken for breach of provisions of section 73A. That, the Deputy Collector had dropped the proceedings under section 73AA, which was

not in accordance with law. He, accordingly, by an order dated 13th January 1989, set aside the order of the Deputy Collector and remanded the matter to the Deputy Collector, Land-8 Scheme, Himmatnagar directing him to consider the matter afresh and take a decision under section 73A of the Code.

5.Pursuant to the aforesaid order of remand, the Deputy Collector issued notices to the concerned parties and after hearing the parties and recording evidence led by them, held that in view of the fact that the notification under section 73A of the Code was issued on 4.4.1961, the subject lands could not have been transferred without the prior sanction of the Collector, hence, there was a breach of section 73A of the Code. He, accordingly by the impugned order dated 29th May, 1989 declared the transfer

effected by virtue of the registered deed No.789 dated 20th April 1976 to be invalid and illegal and directed that the petitioner be removed from the subject lands, viz. survey No.94/2 of village Bundheli and that the possession of the said lands be handed over to Bhagora Kanjibhai Mangalabhai, son and legal heir of deceased Bhagora Mangalabhai Dhanabhai.

6.Being aggrieved by the aforesaid order dated 29th May, 1989 passed by the Deputy Collector, the petitioner preferred an appeal before the Collector, Sabarkantha under the provisions of section 203 of the Code. The Collector in his impugned order dated 19th June 1993, recorded the submission of the petitioner’s advocate that the villages of Bundheli and Patiya-kuwa were Jagiri villages and that during the period

of Idar State survey settlement had been carried out in respect of these villages; that, it cannot be said that the survey settlement carried out in respect of those villages during the time of Idar State was not a survey settlement under the Code, in support of which the decision of the Apex Court in the case reported in AIR 1980 SC59 had been cited. However, the Collector held it was nowhere mentioned in the said decision that village Bundheli was a Jagiri village, and that the advocate for the petitioner had not produced any evidence to show that village Bundheli was a Jagiri village. The Collector, further held that by virtue of the notification dated 4.4.1961 the provisions of section 73A of the Code were made applicable to the tribal areas of Gujarat which included all the villages of Bhiloda Taluka, hence, the provisions of

section 73A were applicable to the subject lands and the same could not be transferred without prior sanction. The Collector observed that the transfer of lands of Survey No.94/2 was from a tribal to a non-tribal on 20.4.1976, which was after the publication of the notification dated 4.4.1961; that section 73AA of the Code came into force with effect from 1.2.1981, prior to which there was a transfer from a tribal to non tribal, hence there was a breach of section 73A of the Act. He, accordingly, confirmed the order of the Deputy Collector and dismissed the appeal.

7.The petitioner carried the matter in revision before the Deputy Secretary (Appeals), Revenue department, Government of Gujarat under section 211 of the Code. The Deputy Secretary after hearing the parties

observed that the original occupant of lands bearing Survey No.94/2 of village Bundheli was a tribal and that the lands have come into the possession of the petitioner who was a non-tribal in the year 1976; that, the sanction of the competent authority had not been obtained prior to effecting the transfer; that, as there appeared to be a breach of section 73AA of the Code, both the Deputy Collector and Collector have held that the possession of the said lands by the petitioner is illegal. The Deputy Secretary held that the transfer of possession took place in 1976; that, under sub-section 4(a)(b) of section 73AA of the Code, the Collector could declare any transfer of land between a tribal and non-tribal effected during the period between 1.4.1961 to 1.2.1981 to be illegal. That, the provisions of section 73AA have been made applicable to

the whole of the State of Gujarat and notwithstanding the fact that a survey settlement may have taken place, the same applies to all the areas of the State. He, accordingly found that there was no reason to interfere with the orders of the Deputy Collector and the Collector and accordingly, rejected the revision application.

8.Aggrieved by the aforesaid orders, the petitioner has filed the present petition.

9.Heard Mr.J.M.Patel, the learned advocate for the petitioner, Mr.Jamshed Dastoor, the learned advocate for Mr.K.H.Bhaya for respondents No.2 to 4, and Ms.D.S.Pandit, the learned Assistant Government Pleader, for the respondent No.1.

10.The contentions of Mr. Patel, learned

Advocate appearing on behalf of the petitioner can be briefly summarised as under:

- The provisions of section 73A and 73AA do not contemplate a transfer by way of exchange; hence, no proceedings could have been initiated under the said provisions in respect of the transaction in question.
- That village Bundheli is situated in Taluka Bhiloda which earlier formed part of the State of Idar. In the year 1936 a survey settlement had been carried out in respect of the State of Idar, including Bhiloda Taluka. The said survey settlement having taken place prior in point of time to the notification dated 4th April 1961 under section 73A of the Code, the provisions of section 73A would not be applicable

to the subject lands. Reliance was placed upon a decision of the Apex Court in the case of Thakoreshri Naharasinghji Dolasinhji v. State of Gujarat, AIR 1980 SC 59 to point out that in fact a survey settlement had taken place in the State of Idar in the year 1936. Reliance was also placed upon a decision of this Court in the case of Devshankar Ambalal Jani v. State of Gujarat, 1997 (1) GLR 279 for the proposition that where survey settlement has taken place prior to the issuance of notification under section 73A, the provisions of section 73A of the Code will not be applicable to the lands in respect of which such survey settlement has taken place. In the facts of the said case also the dispute pertained to land situated in Bhiloda

Taluka, wherein the Court observed that the survey settlement which had been made by the erstwhile State of Idar had come to be accepted by the State of Gujarat, consequently the same became a survey settlement under the Bombay Land Revenue Code. It was held that the subsequent notification dated 4th April 1961 under section 73A of the Code would not be applicable to the lands in respect of which survey settlement had been carried out prior to the publication of the said notification.

- That, the transaction in question was effected in 1976, whereas the proceedings under sections 73A and 73AA of the Code had been initiated sometime in the year 1983, after a considerable delay. Even thereafter, the first order under section 73A of the Code had been

made by the Deputy Collector on 21st May 1984, whereas the said order had been taken in suo motu revision by the Collector towards the end of the calendar year 1988 after a delay of more than three years, hence, the revisional jurisdiction cannot be said to have been exercised within a reasonable period. It was submitted that it is a settled legal position that while exercising powers of suo motu revision, the concerned authority was required to initiate the same within a reasonable time. In support of the said contention reliance was placed upon decisions of the Supreme Court in the case of State of Gujarat v. Patel Raghav Natha, (1969)10 GLR 992 and in the case of Mohamad Kavi Mohamad Amin v. Fatmabai Ibrahim (1997) 6 SCC 71 as

well as the decision rendered by a Division Bench of this Court in the case of Bhagwanji Bawanji Patel v. State of Gujarat,(1971) 12 GLR 156.

- That, even on merits it had been found that the transaction in question was in no manner disadvantageous to the tribal occupant. It was urged that if one keeps in mind the object of the provision, namely to protect the interest of the tribal occupants, in the present case a finding of fact had been recorded in the first order of the Deputy Collector that no prejudice had been caused to the interest of the tribal occupant, and that the said finding had not been dislodged in the subsequent orders.
- That, by the registered deed dated 20th April 1976 there was a transfer of land

from the tribal occupant to the petitioner, at the same time there was a corresponding transfer of land from the petitioner to the tribal occupant. Hence, if the transfer from the tribal occupant to the petitioner was held to be invalid, the entire transaction ought to have been set aside. The transaction in question could not be held to be partly valid and partly invalid.

11.Mr.Dastoor, the learned advocate for the respondents No.2 to 5 submitted that the respondents were in possession of lands of survey No.101 as well as the lands of survey No.94/2. He further submitted that the lands of survey No.94/2 formed part of a block and that, by transfer of the subject lands, there was fragmentation of the block,

hence, there was breach of the provisions of the Prevention of Fragmentation & Consolidation of Holding Act, 1947 (Fragmentation Act), and the transaction was accordingly void under the provisions of the said Act. Learned counsel further submitted that the Deputy Secretary (Appeals) had rightly held that there was a breach of the provisions of section 73AA of the Code as the transaction in question was by way of transfer of land from a tribal to a non-tribal. That, as observed by the Deputy Secretary, the provisions of Section 73AA are applicable to all the areas of the State of Gujarat, whether or not there is a survey settlement, hence, the decision relied upon by the learned advocate for the petitioner would not be applicable to the facts of the present case. The learned advocate submitted that the impugned orders were just

and legal and did not call for any intervention by this Court.

12.Ms.D.S.Pandit, learned Assistant Government Pleader supported the impugned orders. During the course of hearing, the learned Assistant Government Pleader had been directed to obtain instructions on the factual aspect as to whether survey settlement had been carried out in respect of village Bundheli, Taluka Bhiloda at the relevant time when the survey settlement had been carried out in the State of Idar. Thereafter the learned Assistant Government Pleader, instructed by Mr. M.B. Parmar, City Survey Superintendent, who was present in the court, stated that a survey settlement had also been made in respect of village Bundheli at the relevant time i.e. in the year 1936. It was further stated that the

said statement had been made upon verification from the relevant record.

13.In the facts of the present case, the alleged breach of sections 73A and 73AA of the Code is on account of the exchange effected by the registered deed dated 28th April 1976, whereby the lands admeasuring 2 gunthas of survey No.94/2 situated in the sim of Mouje Bundheli, Taluka Bhiloda had been exchanged for the land of survey No.101 of the same village, admeasuring 2 acres 11 gunthas. In this context, it would be relevant to refer to the provisions of Section - 73A of the Code, which read as under :

> “73A. **Power to restrict right of transfer** -
>
> (1)Notwithstanding anything in

the foregoing section, in any tract or village to which the State Government may, by notification published before the introduction therein of an original survey settlement under section 103, declare the provisions of this section applicable, occupancies shall not after the date of such notification be transferable without the previous sanction of the Collector.

(2)The State Government may, by notification in the Official Gazette, from time to time exempt any part of such tract or village or any person or class of persons from the operation of this section."

Section 73AA, as is relevant for the purpose of the present petition, reads as under:

"73AA. **Restriction on transfer of occupancies of tribals to tribals or non-tribals** -

(1)Notwithstanding anything contained in section 73, an occupancy of a person belonging to any of the Scheduled Tribes (hereinafter in this section and in section 73AB referred to as "the tribal") shall not be transferred to any person without the previous sanction of the Collector.

(2)The previous sanction of the Collector under sub-section (1) may be given in such circumstances and subject to such conditions as may be prescribed.

(3)xxxx

(4)Where a tribal -

(a) in contravention of sub-section (1) of this section, or of sub-section (1) of section 73A, or of any other law for the time being in force, transfers his occupancy to any person other than a tribal (hereinafter in this section and in section 73AB referred to as “the non-tribal”) at any time on or after the date of commencement of the Bombay Land Revenue Code (Gujarat Second Amendment) Act, 1980 (Gujarat 37 of 1980) (hereinafter in this section referred to as “the said date”); or

(b) in contravention of sub-section (1) of Section 73A or of any other law for the time being in force has transferred his occupancy to a non-tribal at any time before the said

date.

The Collector shall, notwithstanding anything contained in any law for the time being in force, either suo motu at any time, or on an application made by the tribal transferor or his successor in interest at any time within three years from the said date or the date of such transfer, whichever is later, after issuing a notice to the transferee or his successor in interest, as the case may be, to show cause why the transfer should not be declared void and after making such inquiry as he thinks fit, declare the transfer of such occupancy to be void and thereupon the occupancy together with the standing crops thereon, if any, shall vest in the State Government free from all

encumbrances.

(5) xxxx “

14.Both the sections quoted above, prohibit the transfer of occupancies as specified therein without the prior sanction of the Collector. "Exchange" which is defined under section 118 of the Transfer of Property Act, 1882 is a recognised mode of transfer under the said Act. Hence, the contention raised by the learned advocate for the petitioner that the provisions of section 73A and 73AA of the Code do not envisage a transfer by way of exchange does not merit acceptance.

15.Upon a plain reading of the provisions of section 73A of the Code, it is apparent that the same are applicable to occupancies in any tract or village in respect of which the

Government has before the introduction of an original survey settlement by a notification declared the provisions of the said section to be applicable. In other words for the provisions of the said section to be applicable to occupancies in a tract or village, the notification under section 73A should precede the original survey settlement. In the facts of the present case it is an admitted position that a survey settlement had been made by the erstwhile State of Idar in the year 1936 which covered Bhiloda Taluka, including village Bundheli wherein the subject lands are situated. The question as to whether the settlement of survey for land revenue made by the erstwhile State of Idar, prior to the introduction of the Bombay Land Revenue Code could be said to be a survey settlement under the Code came up for consideration

before this Court in the case of Devshankar Ambalal Jani v. State of Gujarat (supra) and it was held that the survey settlement carried out by some authority before the introduction and remaining in force at the date of commencement of the Bombay Land Revenue Code (Amendment) Act, 1939 becomes a survey settlement under the Bombay Land Revenue Code. It was further held that the survey settlement of land carried out by the authority of the erstwhile State of Idar and accepted by the State of Gujarat had become a survey settlement under the Bombay Land Revenue Code. Thus on facts it cannot be disputed that the survey settlement was made in respect of Bhiloda Taluka including village Bundheli in the year 1936, whereas the provisions of section 73A of the Code had been made applicable to the same by a notification dated 4th April 1961. The basic

requirement for applicability of the provisions of section 73A of the Code is that the notification under section 73A should precede the original survey settlement, which is not fulfilled in the present case inasmuch as the original survey settlement was introduced much before the notification under section 73A of the Code. Hence, the learned Advocate for the petitioner is right in contending that the provisions of section 73A of the Code are not applicable to the subject lands, and therefore, prior sanction of the Collector was not required for transferring the same. This view is fortified by the aforesaid decision of this Court wherein this Court had noted the fact that the notification under section 73A of the Code issued by the respondent No.1 State of Gujarat dated 4.4.1961 clearly *ipso facto* says that it

shall apply to all those villages in the Scheduled areas in the State of Gujarat in which survey settlement under the Bombay Land Revenue Code has not been introduced and to which the provisions of section 73A have not been made applicable before issue of notification. It was held that since survey settlement in respect of the disputed land situated in Bhiloda in Sabarkantha district had been made in, as early as 1934, the said notification will not apply to the disputed land.

16.Insofar as the applicability of the provisions of section 73AA of the Code is concerned, sub-section (1) of section 73AA places a restriction on transfers of occupancies from tribals to tribals and non-tribals without the previous permission of the Collector. Section 73AA was enacted by

the Gujarat Act 37 of 1980. Under the provision of clause (a) of sub-section (4) of section 73AA, the Collector can suo motu, at any time, on an application made by the tribal transferor or his successor at any time within three years from the said date or the date of such transfer, whichever is later, initiate proceedings in contravention of sub-section (1) of section 73AA in case where a tribal transfers his occupancy to any person other than a tribal at any time after the date of commencement of the Bombay Land Revenue Code (Gujarat Second Amendment) Act, 1980 (Gujarat 37 of 1980). Thus it is clear that the said provision applies to contravention of sub-section (1) of 73AA any time on or after the date of commencement of the Bombay Land Revenue (Gujarat Second Amendment), Act, 1980. Hence, transfer of occupancy by a tribal to a non-tribal prior

to the coming into force of the Amendment Act of 1980 cannot be said to be a contravention falling within the ambit of sub-section (1) of section 73AA. In the facts of the present case the transfer of occupancy by way of exchange has been effected in 1976, that is much before the coming into force of the Amendment Act of 1980, hence, the same cannot in any manner said to be in contravention of sub-section (1) of section 73AA of the Code.

17.Under the provisions of sub-clause (b) of sub-section (4) of Section 73AA of the Code, the Collector is empowered to exercise similar powers in case of contravention of sub-section (1) of Section 73A or any other law for the time being in force in case where a tribal has transferred his occupancy to a non-tribal at any time before the

commencement of the Bombay Land Revenue Code (Gujarat Second Amendment) Act, 1980. Hence, in case of breach of the provisions of Section 73A of the Code, the Collector has the power to initiate proceedings for contravention of the provisions of the said sub-section at any time within three years from the date of transfer or the date of commencement of the Amendment Act. However, as observed above, the provisions of Section 73A are not applicable to the subject lands in view of the fact that the original survey settlement in respect of the said village had preceded the notification under Section 73A of the Code. The Deputy Secretary, (Appeals), while holding that there being a transfer from a tribal to a non-tribal, there is a breach of Section 73AA of the Code, and that as the provisions of Section 73AA are applicable to the whole of the

State of Gujarat it is irrelevant as to whether the survey settlement has been carried out or not, has lost sight of the provision of clause (a) of sub-section (4) of Section 73AA, which makes contravention of sub-section (1) of Section 73AA applicable to transfers effected by a tribal to a non-tribal, on or after the date of commencement of the Amendment Act. Whereas in the present case it is an admitted position that the transfer in question has been effected much prior to the date of commencement of the Amendment Act.

18. In view of what is held hereinabove, as the petition is required to be allowed on the basic ground that the provisions in respect of which contravention is alleged and consequent action has been taken are not applicable to the transaction in question,

it is not necessary to deal with the contention as regards limitation as well as on the merits of the transaction.

19.For the reasons stated hereinabove, it is held that neither the provisions of Section 73A of the Code, nor the provisions of Section 73AA of the Code are applicable to the transfer in question. Accordingly, the impugned orders dated 30th June 1995 passed by the State Government (Annexure “F”), the order dated June 1993 passed by the Collector, Sabarkantha (Annexure “E”), the order dated 29th May 1989 passed by the Deputy Collector, LAND-8 Scheme, Sabarkantha, Himmatnagar (Annexure “D”) as well as the order dated 13th January 1989 passed by the Collector, Sabarkantha (Annexure “C”), are quashed and set aside.

20.In the result, the petition is allowed. Rule is made absolute accordingly, with no order as to costs.

[HARSHA DEVANI, J.]

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